

**The Celotex Corporation and Brotherhood of Teamsters and Auto Truck Drivers, Local #70, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Teamsters Warehousemen's Local #853, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Joint Petitioners.**  
Case 32-RC-1456

May 12, 1983

# DECISION, ORDER, AND DIRECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections and determinative ballots to an election<sup>1</sup> held on November 12, 1981, and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief and hereby adopts the Hearing Officer's findings<sup>2</sup> and recommendations, as consistent herewith.<sup>3</sup>

We agree with the Hearing Officer's recommendations that the challenges to the ballots of P. Byrd, G. Locklear, and G. Binczek be overruled.<sup>4</sup> We do not agree, however, with the Hearing Officer's recommendation that the disputed ballot be ruled void.

The disputed ballot had no markings on the front of the ballot but had the word "no" written on the back of the ballot. The Hearing Officer found that, where a ballot contains no markings on its face, any conclusion about the voter's intent based on

the markings on the back of the ballot must be entirely speculative. In voiding the ballot, the Hearing Officer relied on the Board's Decision in *Columbus Nursing Home*, 188 NLRB 825 (1971).

The case relied on by the Hearing Officer, *Columbus Nursing Home*, was overruled by the Board, shortly after the Hearing Officer's report issued, in *Hydro Conduit Corp.*, 260 NLRB 1352 (1982).<sup>5</sup> In *Hydro Conduit*, the Board majority held that:

. . . in keeping with our longstanding policy of attempting to give effect to voter intent whenever possible, we will hereafter count any unambiguous expression of voter intent as expressed on the ballot. Any doctrine to the contrary as expressed in *Columbus Nursing Home, Inc.*, *supra*, or other cases where we have refused to consider voter intent when marked on the back of the ballot, is hereby overruled. [260 NLRB at 1352.]

Consistent with *Hydro Conduit Corp.*, above, we hereby reverse the Hearing Officer's recommendation on the disputed ballot with the "no" marking on the back of the ballot, because the voter's intent is clear. Hence, we shall direct that the subject ballot be counted as a vote against the Petitioners.

The Hearing Officer also recommended that the Employer's objections be overruled in their entirety. We agree with his recommendations on objections, as modified below.

The Employer presented certain evidence of alleged misrepresentations of fact concerning evidence related to the amount of possible assessments which each employee-member might have to pay because of a pending lawsuit against one of the two Joint Petitioners. In recommending that this objection be overruled, the Hearing Officer relied on the greater specificity of testimony by Joint Petitioners' representatives and found no misrepresentation. On August 4, 1982, a Board majority abandoned the *Hollywood Ceramics* approach<sup>6</sup> to campaign misrepresentations and returned to the rule in *Shopping Kart Food Market*, 228 NLRB 1311 (1977), with its Decision in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). Since the Board will no longer probe into the truth or falsity of the parties' campaign statements, we conclude that the Peti-

<sup>1</sup> The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 19 for, and 15 against, the Petitioners; there were 5 challenged ballots and 1 disputed ballot which were sufficient in number to affect the results of the election.

<sup>2</sup> The Employer has excepted to certain credibility resolutions of the Hearing Officer. It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Coca-Cola Bottling Co. of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing his findings.

<sup>3</sup> The Employer has appealed the Regional Director's refusal to grant the Employer's request for a Hearing Officer from outside Region 32 to conduct the hearing. This appeal rests on the Employer's contention that, in view of the allegations of misconduct by an agent of Region 32 arising from the late opening of the polls, the Regional Director should have appointed a Hearing Officer from outside Region 32 to avoid the appearance of bias or prejudice.

It is within the Regional Director's discretion to determine when a Hearing Officer from outside the Region should be assigned. No abuse of that discretion has been shown here. Neither has the Employer alleged, nor does the record establish, bias or prejudice by the Hearing Officer here. Accordingly, we hereby deny the Employer's request.

<sup>4</sup> In the absence of exceptions thereto, we adopt, *pro forma*, the Hearing Officer's recommendations that the challenges to the ballots of J. Horews and C. Crosby be sustained.

<sup>5</sup> The Hearing Officer's report issued on March 3, 1982, and the *Hydro Conduit* decision issued on March 31, 1982.

In accordance with his dissent in *Hydro Conduit Corp.*, Member Jenkins would adopt the Hearing Officer's recommendation to sustain the objection to the ballot marked solely on the reverse side of the ballot.

<sup>6</sup> *Hollywood Ceramics Company*, 140 NLRB 221 (1962).

tioners' statements involved here were not objectionable.<sup>7</sup>

Finally, we turn to the Hearing Officer's recommendation that the Employer's objection based on evidence of late arrival of the Board agent for the election and the resulting late opening of the polls be overruled. The Hearing Officer recommended that this objection be dismissed because no evidence was presented that any employee had been disenfranchised by the late opening of the polls or that the Joint Petitioners' representatives, observers, or supporters campaigned in and around the polls prior to or during the scheduled voting period.

In its exceptions, the Employer claimed that cumulative irregularities resulting from the late opening of the polls had a tendency to influence the election outcome. Specifically, the Employer claims that employees were lined up waiting to vote throughout the morning voting session. The Employer further claims that the Board agent hurried employees during the morning voting session by giving quick instructions and directions to leave quickly after they voted. In this regard, the Employer pointed to evidence that the Board agent admonished an employee not to look at the voting list and failed to give to another employee adequate instructions on the proper sealing of a ballot.<sup>8</sup> The Employer also pointed to an incident involving one voter who was uncertain about whether to vote and how to mark his ballot. This employee, identified only as "Doug, a laborer," asked for instructions from the Board agent who responded ". . . if you're not sure, don't vote." The employee returned the ballot without voting.

The applicable principles for determining objections based on late opening of the polls were summarized in *Jobbers Meat Packing Co.*,<sup>9</sup> where the Board held that it will not set aside an election based solely on the Board agent's late arrival at the polling place that causes the election to be delayed. An election will be set aside, however, where it is shown that the vote of possible excluded employees could have been determinative. In addition, the Board has set aside elections where the votes of the possibly excluded employees could not have been

determinative but where the record showed accompanying circumstances that suggested that the vote may have been affected by the Board agent's late opening or early closing of the polls, or where it was impossible to determine whether such irregularity affected the outcome of the election.

Applying these principles here, we do not find that the results of the election held on November 12, 1981, should be set aside. The Employer's objections did not allege any possible disenfranchisement of employees. Instead, the only reference in the Employer's brief to an incident where an employee did not vote was offered in support of its contention that the Board agent hurried the voters during the morning session. This employee, however, appeared in the polling area and chose not to vote. These circumstances are in marked contrast to those in the cases relied on by the Employer where employees possibly were disenfranchised because Board agents arrived after the end of a shift or closed the polls while employees were waiting in line to vote. Furthermore, the tally of ballots shows that the number of employees casting ballots, including the challenged ballots that are to be opened and counted, exceeded the approximate number of eligible voters.

In sum, we agree with the Hearing Officer's recommendation to overrule the Employer's objections in their entirety, and shall direct that certain ballots be counted and that a revised tally of ballots and the appropriate certification shall be issued.

### ORDER

It is hereby ordered that the Employer's objections be, and they hereby are, overruled in their entirety.

IT IS FURTHER ORDERED that the disputed ballot with the "No" marking on the back of the ballot be counted as a vote against the Petitioners.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 32 of the National Labor Relations Board for action consistent with this Order.

### DIRECTION

It is hereby directed that the Regional Director for Region 32 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots of P. Byrd, G. Locklear, and G. Binczek, and thereafter prepare and cause to be served on the parties a revised tally of ballots and the appropriate certification.

<sup>7</sup> Member Jenkins adheres to his dissenting opinion in *Midland National*, but considers himself institutionally bound to apply the majority standard of that case until such time as it is reversed. Additionally, he would find, in agreement with the Hearing Officer, that the Union's campaign statements were not objectionable under the *Hollywood Ceramics* standard.

<sup>8</sup> The Employer also claimed that the Board agent's improper instructions were responsible for one ballot being marked on the back. As discussed above, that ballot has been found to be valid and will be opened and counted.

<sup>9</sup> 252 NLRB 41 (1980), and the cases cited therein.